

**DeMarco v Adler**

2019 NY Slip Op 34082(U)

January 14, 2019

Supreme Court, Westchester County

Docket Number: 62997/17

Judge: David F. Everett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
NANCY DEMARCO,

Plaintiff,

-against-

JEFFREY ADLER, ALEX TIEVSKY and  
ADLER FOOTCARE OF GREATER  
NEW YORK, P.C.,

Defendants.

-----X  
EVERETT, J.

Index No. 62997/17  
Motion Sequence No. 002  
Decision and Order

The following papers were read on the motions:

Notice of Motion/Affirmation in Supp/Exhibits 1-7/Aff of Serv (docs 28-37)

Plaintiff Nancy DeMarco (DeMarco) moves for an order granting leave for extended time in which to serve an amended summons and complaint on Donna Hartmann (Hartmann) and Shweta Raina (Raina) and bring them into the action as necessary party defendants, and amending the caption to reflect their inclusion in the action. Upon the forgoing papers, the unopposed motion is granted.

DeMarco commenced the instant action sounding in podiatric malpractice, by filing a summons with notice in the Office of the Westchester County Clerk on August 25, 2017, to recover damages for injuries she allegedly sustained as a result of the care and treatment rendered to her, in connection with a bunion, at defendant Adler Footcare of Greater New York, P.C. (Adler Footcare) between April 1, 2014 and December 2015. Issue was joined by service of

defendants Jeffrey Adler (Adler) and Adler Footcare's joint answer with affirmative defenses, and by defendant Alex Tievsky's (Tievsky) answer with affirmative defenses, on or about September 26, 2017.

According to DeMarco, she saw various podiatrists during her multiple visits to Adler Footcare for bunion treatment, and underwent several different procedures, including surgery on six separate occasions. She contends that, it was not until August 2018, that she discovered that Hartmann and Raina, who were among the podiatrists who treated her at Adler Footcare, were independent contractors. DeMarco points out that their status as independent contractors was confirmed by Adler during his deposition in October 2018.

DeMarco now seeks to add these two treating podiatrists as new party defendants in her malpractice action, and because the statute of limitations has run, she relies on the relation back doctrine to permit the proposed amended filing as against Hartmann and Raina to relate back to the date of the filing of the instant action.

In support of her motion, DeMarco argues that the motion should be granted because: (1) her claims against Hartmann and Raina arise out of the same conduct, transaction or occurrence, that being the podiatric treatment she received at Adler Footcare; (2) Hartmann and Raina are united in interest with defendants Adler, Alex Tievsky and Adler Footcare; and (3) Hartmann and Raina knew, or should have known that, but for her lack of knowledge of their names, and that their relationship with Adler Footcare was that of independent contractors, they would have been individually named as defendants at time of commencement of the action.

Although DeMarco states a proper basis for the application of the relation back doctrine, and the motion is unopposed by defendants Adler, Tievsky and Adler Footcare, the proposed

defendants, Hartmann and Raina, have not had an opportunity to address this issue. The Court is unwilling to deny Hartmann and Raina the opportunity to raise and litigate a statute of limitations defense, should they consider it a proper course of action in the event service is properly effected upon them.

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that the amended summons and verified amended complaint in the proposed form annexed to the moving papers shall be served in accordance with the Civil Practice Law and Rules upon proposed defendants Donna Hartmann and Shweta Raina within 30 days of notice of entry of this decision and order; and it is further

ORDERED that the extension of time to serve proposed defendants Donna Hartmann and Shweta Raina is without prejudice to these new defendants having an opportunity to raise and litigate a statute of limitations defense; and it is further

ORDERED that the action shall bear the following caption:

-----X  
NANCY DEMARCO,  
Plaintiff,

JEFFREY ADLER, ALEX TIEVSKY, DONNA  
HARTMANN, SHWETA RAINA and ADLER  
FOOTCARE OF GREATER NEW YORK, P.C.,

Defendants.  
-----X;

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice

of entry upon the County Clerk and upon the Clerk of the Court, who are directed to mark the court records to reflect the additional party defendants; and it is further

ORDERED that counsel are directed to appear for a compliance conference on February 11, 2019, at 9:30 a.m., in room 800, at the Westchester County Courthouse at 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
January 14, 2019

ENTER:



HON. DAVID F. EVERETT, J.S.C.

Electronically Filed

Meagher and Meagher  
Voute, Lohr, Fink, Magro & Collins  
Feldman Kieffer, LLP